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No. 96-957

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MELVIN JEFFERSON, individually and as the
Administrator of the Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellees below, are the administrator of the estate of Alberta K. Jefferson, who is also one of her sons, and another son and the husband of the decedent. The administrator, Melvin Jefferson, brought claims under the Alabama Wrongful Death Act (Ala. Code § 6-5-410) and 42 U.S.C. § 1983, seeking damages "for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured." J.A. 9, 10-11. The other petitioners, Leon and Benjamin Jefferson, as well as Melvin Jefferson in his individual capacity, brought only state law tort claims. *See id.* 7-8; Pet. Br. 3; Pet. 4.

Respondent, defendant-appellant below, is the City of Tarrant, Alabama, a municipality organized under the laws of the State of Alabama. The City of Tarrant Fire Department and numerous "[f]ictitious" individual parties were also named as defendants. J.A. 4. The Fire Department was dismissed as a defendant, however, because it is an entity of the City of Tarrant that is not capable of being sued in its own capacity. *Id.* 114. No individual defendants are parties to this proceeding because petitioners did not substitute for the fictitious parties named in the complaint any of the actual individuals involved in the alleged wrongdoing, as they were permitted to do under Alabama practice. *See Ala. R. Civ. P. 9(h).*

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MELVIN JEFFERSON, individually and as the
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CITY OF TARRANT, ALABAMA,
Respondent.

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BRIEF FOR RESPONDENT

INTRODUCTION

This is a Section 1983 action brought by the administrator of the estate of Alberta K. Jefferson in state court to recover damages for injuries suffered by the decedent as a result of an alleged deprivation of the decedent's federal rights. Section 1983—consistent with the common law rule in effect at the time it was enacted—does not supply a remedy for the deceased or her survivors in these circumstances. But Alabama, like each of the other 49 states, has abrogated the common law rule and established such a remedy. Under the Alabama Wrongful Death Act (Ala. Code § 6-5-410), a decedent's estate may commence an action against another for intentionally or negligently causing the decedent's death. The Alabama courts for

more than a century have declared that this action is penal in nature, and thus is redressed through punitive rather than compensatory damages.

In Alabama a decedent's estate may recover punitive damages for wrongful death against both individuals and municipalities. Under Section 1983, by contrast, punitive damages are recoverable against individuals but not municipalities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Applying the *Fact Concerts* rule, the Alabama courts have held that in a Section 1983 action, such as this, in which Alabama law is invoked to recover damages for wrongful death, a decedent's estate may not recover punitive damages against a municipal—as opposed to individual—defendant. Because compensatory damages are not available for wrongful death under Alabama law, the *Fact Concerts* rule has the effect of barring recovery against a municipality for injuries to a decedent, except for nominal damages.

The question presented is whether the Alabama Wrongful Death Act governs the recovery available under Section 1983 to a decedent's estate in these circumstances. 117 S. Ct. 1333. The answer is—yes. Congress has not established a survival or wrongful death scheme for Section 1983.¹ It has, however, instructed that when federal

¹ Generally speaking, “[s]urvival statutes permit the deceased’s estate to prosecute any claims for personal injury the deceased would have had, but for his death. They do not permit recovery for harms suffered by the deceased’s family as a result of his death.” *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974) (emphasis in original). Wrongful death statutes, on the other hand, typically create a cause of action in favor of the deceased’s survivors—“beyond which the decedent had”—for the survivor’s injuries resulting from the deceased’s death, such as loss of consortium or the like. *Id.* at 578 n.5. As explained below, because the personal representative in this case seeks damages under the Alabama statute and Section 1983 for injuries suffered by his decedent (i.e., Mrs. Jefferson), not her survivors, the representative’s Section 1983 claims are better characterized as survival rather than wrongful death claims.

law is not adapted to a particular object under Section 1983, courts should apply the common law as modified by statutes of the forum state, unless that law is “inconsistent” with federal law. 42 U.S.C. § 1988(a). As we explain, the Alabama Wrongful Death Act is not inconsistent with federal law—including either the general compensatory or deterrence aims of Section 1983—and thus, pursuant to Section 1988, that Act governs the recovery available to a decedent’s estate under Section 1983.

This result limits the recovery to the decedent’s estate on the particular Section 1983 claims pleaded here. But, as Justice Marshall wrote for the Court in *Robertson v. Wegmann*, 436 U.S. 584, 593 (1980), “[a] state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” Mrs. Jefferson’s estate, moreover, has failed fully to avail itself of the remedies available to it under Section 1983 and Alabama law. Unlike the state survival statute challenged in *Robertson*, the Alabama statute—even when coupled with *Fact Concerts*—does not deny a decedent’s estate any avenue of redress under Section 1983, but instead limits the recovery available against municipal defendants. Under the Alabama law a decedent’s estate may seek substantial damages for wrongful death under Section 1983 from individual wrongdoers. Mrs. Jefferson’s estate, however, simply elected not to press such claims.

There is nothing inherently unfair or discriminatory about this result, or Alabama’s decision to redress wrongful killings through punitive damages in the first place. The Alabama Wrongful Death Act was adopted long before this Court decided *Fact Concerts*, and it is undisputed that the statute’s remedial scheme was *not* motivated by any discriminatory intent. Indeed, the overriding purpose of the Alabama scheme is to prevent wrongful killings. This Court itself, moreover, has declared that punitive damages “are especially appropriate to redress the violation by a Government official of a citizen’s constitu-

tional rights." *Carlson v. Green*, 446 U.S. 14, 22 (1980). In any event, because Section 1988 directs that the Alabama statute be applied to survival or wrongful death actions brought in Alabama pursuant to Section 1983, petitioners' objections to the recovery available in these circumstances should be directed to Congress, not this Court.

JURISDICTION

As an initial matter, it must be noted that this Court lacks jurisdiction to review the interlocutory order of the Alabama Supreme Court in this case. This Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). It is apparent from the face of the Alabama Supreme Court's decision that it did not render a "final judgment." The last sentence of the court's opinion concludes "the cause is remanded for further proceedings consistent with this opinion," followed by the directive "Reversed and Remanded." J.A. 121. There are indeed further proceedings yet to come in the case: the issue decided by the Alabama Supreme Court concerned only Counts III and IV of petitioners' complaint; the state wrongful death count was unaffected and remains for trial. *See id.* 7-10.²

There can be no dispute about the interlocutory nature of the decision below. Indeed, the case only reached the Alabama Supreme Court because it was certified pursuant to Alabama Rule of Appellate Procedure 5, authorizing review of certain interlocutory orders. *See* J.A. 115; Ala. R. App. P. 5(a). Since the issue of this Court's jurisdiction turns on the construction of 28 U.S.C. § 1257(a), whether a ruling is a final judgment under that provision is a question of federal, not state law. *See Department of*

² Subsequent to the Alabama Supreme Court's decision, the trial court on remand granted partial summary judgment in favor of the City on Count II. *See* J.A. 114; Opp. 3. Count I—the state wrongful death claim—remains for trial.

Banking v. Pink, 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The decision of the Alabama Supreme Court to review the federal issue in an interlocutory posture thus can have no effect on whether its ruling is final for purposes of Section 1257(a). *See, e.g., Flynt v. Ohio*, 451 U.S. 619 (1981) (dismissing writ of certiorari for want of jurisdiction due to lack of finality despite decision of state supreme court to review intermediate court decision remanding case for trial).

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). To be final and reviewable, a state court decision "must * * * be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and *as to all the causes of action involved*." *Collins v. Miller*, 252 U.S. 364, 370 (1920) (emphasis added). The decision below—remanding for trial on remaining counts—plainly does not meet this standard. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 72 (1987) ("Over the years the Court has consistently applied a strict test of finality to determine the reviewability of state-court decisions remanding cases for further proceedings") (Stevens, J., dissenting).

Nor does the decision below fall within any of the four categories of cases in which the Court has treated state-court judgments as final even though further proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975).³ The

³ *Cox* holds that the finality requirement may be satisfied despite the pendency of further proceedings when (1) "there are further

first, third, and fourth *Cox* categories are plainly inapplicable. The second category involves cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This case does not fit into that category because resolution at trial of Count I—the state wrongful death claim—could well affect the survival of the federal issue, given the overlap between the factual predicates for Count I and the Section 1983 counts.

A determination under Count I that Mrs. Jefferson's death was *not* "caused by the intentional, negligent, wanton, careless and unskilled actions and inactions" of the City, J.A. 7, for example, would preclude any recovery under Section 1983, so that the federal issue of the availability of relief under that section would not "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. See *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984) (litigation of state court claims preclusive in subsequent Section 1983 action); *George v. White*, 837 F.2d 1516 (11th Cir. 1988) (same; applying Alabama preclusion law).⁴

proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue * * * will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 479-483.

⁴ The fact that the federal issue may or may not survive the proceedings on remand distinguishes this case from *Pennsylvania*

The foregoing is confirmed by *O'Dell v. Espinoza*, 456 U.S. 430 (1982). In that case, the Court granted certiorari to consider whether a surviving child may assert a Section 1983 claim for the wrongful death of a parent. After argument, however, the Court unanimously dismissed the writ as improvidently granted, holding that because the state supreme court "remanded this case for trial, its decision is not final 'as an effective determination of the litigation.'" *Id.* at 430 (quoting *Market Street Ry.*, 324 U.S. at 551). The Court specifically noted that "there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts," *id.* (citing *Cox, supra*), but that "this case does not fit into any of those categories." *Id.*

This case is indistinguishable from *O'Dell* and, as in that case, the writ should be dismissed as improvidently granted.⁵

STATEMENT OF THE CASE

On June 21, 1994, petitioner Melvin Jefferson, administrator of the estate of his mother, Alberta K. Jefferson, filed suit in the Circuit Court of Jefferson County, Alabama, against the respondent City of Tarrant, Alabama, the City of Tarrant Fire Department, and numerous "[f]ic-

v. Ritchie, supra. Due to the "unusual facts" of *Ritchie*, the federal issue would not have survived the remand regardless of the outcome. 480 U.S. at 47-49 n.7. Here, by contrast, whether the federal claim will survive depends on the result of the proceedings on remand—which is precisely why the decision is not final and not within any of the *Cox* exceptions.

⁵ Respondent's brief in opposition noted that the decision below was interlocutory, that the Alabama Supreme Court "remanded the case," and that Count I of petitioners' complaint remained for trial. See Opp. 2, 3. The opposition did not, however, expressly assert lack of jurisdiction for want of finality, arguing instead that the federal questions were not properly raised below. See Sup. Ct. R. 15.2.

titious * * * agents and/or employees" of these government entities, alleging that these defendants had wrongfully caused the death of Mrs. Jefferson. J.A. 3-5.⁶ Mrs. Jefferson's other son and husband joined as plaintiffs, but asserted only state law claims for infliction of emotional distress. *Id.* 3, 7; Pet. Br. 3; Pet. 4. The complaint alleged that Mrs. Jefferson died during a dwelling fire, and that the Fire Department and fictitious individuals wrongfully failed to rescue or revive her. *See* J.A. 5.⁷

The complaint raised both state and federal claims. Counts I and II sought relief under the Alabama Wrongful

⁶ Under Alabama practice a plaintiff may plead claims against "fictitious parties" if he is "ignorant of the name of the opposing party," and later amend the pleadings to substitute the name of the actual party. Ala. R. Civ. P. 9(h). *See Cooper v. Thomas*, 456 So.2d 280 (Ala. 1984). Petitioners, however, have not sought to amend their complaint to substitute the names of any actual individuals involved in the alleged wrongdoing; thus, there are no actual individual defendants in this case.

⁷ Petitioners have alleged "that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson." Pet. Br. 3. *See* J.A. 6. While, for purposes of defending the interlocutory order below, the City treats the allegations as true, the evidence adduced to date shows the following:

Mrs. Jefferson died on December 4, 1993. The City of Tarrant Fire Department received a call at about 9:45 p.m. that evening, informing it that Mrs. Jefferson's residence—a one-story wood frame building—was in flames. Fire Department personnel arrived on the scene at about 9:49 p.m.—less than five minutes after they received the call. Mrs. Jefferson was pulled from the fire by rescue personnel and pronounced dead at 9:50 p.m. It was later determined that she had died from smoke inhalation at about 9:40 p.m., before any call was placed to the Fire Department. *See* J.A. 30, 45.

To support the claim of discriminatory treatment, petitioners rely principally on the affidavit of Ida Bell Pugh, which states that during a 1992 fire, the Fire Department "made no attempt to put out the fire quickly." R. 221. Mrs. Pugh's affidavit contains no indication of her race. When asked under oath whether they knew of any facts showing that Mrs. Jefferson was denied fire protection on account of her race, both Benjamin and Melvin Jefferson replied in the negative. *See* J.A. 38-41.

Death Act (Ala. Code § 6-5-410) and the state law tort of infliction of emotional distress, respectively. J.A. 7-8. Count III sought relief under 42 U.S.C. § 1983 for alleged deprivation of Mrs. Jefferson's life in violation of her rights under the Fourteenth Amendment, and Count IV sought relief under 42 U.S.C. § 1983 for alleged denial of Mrs. Jefferson's right to equal protection in violation of the same amendment. J.A. 8-10. The Section 1983 counts sought "compensatory and punitive damages * * * for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured." J.A. 9, 10-11. The complaint thus sought damages only on the basis of injury to the decedent, not to any survivors.⁸

The City denied the allegations, J.A. 17-24, and moved for judgment on the pleadings as to the two Section 1983 counts. J.A. 88-90.⁹ The City's motion explained that Section 1983 does not address whether a cause of action for personal injuries to a decedent survives her death, but that, pursuant to 42 U.S.C. § 1988, this question was governed by applicable state law. Section 1988 provides that Section 1983 actions are governed by "the laws of the United States,"

but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal

⁸ Indeed, none of petitioners has asserted wrongful death claims under Section 1983 for injuries to themselves resulting from Mrs. Jefferson's death. To the extent they seek damages for personal injuries, petitioners' claims are confined to Count II—the state law infliction of emotional distress claim. *See* J.A. 7, 9, 10-11; Pet. Br. 3; Pet. 4.

⁹ The City also moved to dismiss the Fire Department as a defendant on the ground that it is an entity of the City of Tarrant that is not capable of being sued in its own capacity. The trial court granted that motion. J.A. 114.

cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause * * *. [42 U.S.C. § 1988(a).]

Although the common law barred civil actions seeking damages for wrongs resulting in death—whether through survival of claims the decedent would have had but for her death, or through the claims of survivors for their own injuries as a result of the decedent's death—that rule was abrogated by statute in Alabama nearly 150 years ago. Under the Alabama Wrongful Death Act,

[a] personal representative may commence an action and recover such damages as the jury may assess * * * for the wrongful act, omission or negligence of any person, persons or corporation, * * * whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death. [Ala. Code § 6-5-410(a).¹⁰]

The purpose of this provision is to punish wrongdoers in order to discourage the tortious infliction of death, and

¹⁰ This provision is the modern day successor to "An Act to Prevent Homicides," which was enacted by the Alabama legislature in 1872. The 1872 Act modified the first such statute passed in Alabama in 1852, which was virtually identical to Lord Campbell's Act, 9 & 10 Vict., ch. 93 (1846). See Charles W. Gamble, *Alabama Law of Damages* § 37-2 at 542 (3d ed. 1994). In addition to Section 6-5-410, Alabama has established separate causes of action in favor of parents governing the wrongful death of a minor, Ala. Code § 6-5-391, and in favor of representatives for injuries to a decedent's property resulting from a wrongful act causing death. *Id.* § 6-5-411. In addition, Alabama law provides for the survival of any personal injury or other claims pending at the time of a decedent's death. See *id.* §§ 6-5-462 to -464; Gamble, *supra* § 37-3 at 543. See generally Comment, *Surviving the Death of a Party: Alabama's Survival Statutes*, 22 Cumb. L. Rev. 711 (1992).

thus preserve human life. See *Geohagen v. General Motors Corp.*, 279 So.2d 436, 439 (Ala. 1973) (Alabama statute "intended to protect human life, to prevent homicide, and to impose civil punishment on takers of life"); *Alabama Great S.R.R. v. Burgess*, 22 So. 913 (Ala. 1897) (same); cases cited *infra* at 35. Accordingly, liability under the Alabama wrongful death statute is—and for more than a century has been—assessed in the form of punitive rather than compensatory damages, based on the degree of culpability of the wrongdoer. See Gamble, *supra* § 37-9 at 549; J.A. 119-120.¹¹

As the City's motion for judgment on the pleadings noted, this Court in *City of Newport v. Fact Concerts, Inc.*, *supra*, ruled that under federal law punitive damages are not available against a municipality in an action

¹¹ The availability of punitive damages for wrongful death is more generous than it is for all other torts in Alabama. To obtain punitive damages in any action *other than* wrongful death, a plaintiff must "prove[] by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Ala. Code § 6-11-20. In wrongful death actions, however, a plaintiff not only is not held to the clear-and-convincing-evidence standard, but may recover punitive damages for mere negligence. *Id.* § 6-5-410(a). See Gamble, *supra* § 37-3 at 543 n.4. See, e.g., *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1987) (upholding \$3.5 million wrongful death award to estate of motorist killed by log falling from passing truck).

Alabama law limits to \$100,000 the recovery of damages—in any action—against a municipality or other government entity for death or bodily injury. Ala. Code § 11-93-2. This cap applies to suits brought against individual officers or employees of municipalities for damages arising from *negligent* misconduct, for which such individuals are indemnified pursuant to Alabama law. See *Benson v. City of Birmingham*, 659 So.2d 82 (Ala. 1995). The cap does not, however, apply to suits brought against such individuals "for damages arising out of actions which were either *intentional or willful or wanton*," for which such individuals are not indemnified. Ala. Code § 11-47-24(a) (emphasis added). See note 29, *infra*.

brought under Section 1983. J.A. 89. Thus, because a personal representative may not recover compensatory damages under the Alabama Wrongful Death Act, and because punitive damages are not available against a municipality under federal law, the City argued in its motion that Mrs. Jefferson's administrator was not entitled to recover against it—as opposed to any individual wrongdoers—either compensatory or punitive damages in a Section 1983 action for wrongful death. *Id.* In other words, the City's motion argued, "Mrs. Jefferson's claim for compensatory damages under § 1983 did not survive [her death]." *Id.*

The Alabama Circuit Court granted judgment on the pleadings on the Section 1983 counts as to punitive damages, but denied such relief as to compensatory damages. J.A. 108. The court certified its order for interlocutory appeal to the Alabama Supreme Court, which agreed to review the non-final decision to consider "[w]hether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama wrongful death statute." J.A. 109-110, 115-116. The Alabama Supreme Court reversed, holding that the Alabama statute, not federal common law, governed the decedent's claim for compensatory damages and barred recovery of such damages. *Id.* 121.

Relying on its decision in *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984), the Alabama Supreme Court rejected the argument that application of the Alabama Wrongful Death Act was inconsistent with federal law. In *Carter* the court explained that the Alabama statute was consistent with Section 1983's policies of deterrence and compensation. The state regime promoted deterrence because a "tortfeasor who caused death by his actions would, if found liable * * *, face a punitive damage award designed to punish him for his wrongful act." *Id.* at 376 (internal quotation marks omitted). And the state law focus on

punitive damages did not conflict with Section 1983's compensation policy, because "where the injured party is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is he is no longer present to benefit from any damages awarded." *Id.* (internal quotation marks omitted; emphasis in original). As the *Carter* court explained, this Court in *Robertson v. Wegmann*, *supra*, reached the same conclusion in similar circumstances. 444 So.2d at 376-377.

The Alabama Supreme Court remanded for further proceedings on petitioners' remaining state law claims. *See* J.A. 117-121. Prior to any proceedings on remand, however, this Court granted certiorari on the modified question set forth on page i above.

SUMMARY OF ARGUMENT

The question whether the Alabama Wrongful Death Act governs the recovery by a decedent's estate under Section 1983 turns on application of Section 1988 of the Civil Rights Acts. That provision directs courts to apply federal law whenever it is adapted to the particular object at hand, but when federal law is silent or deficient with respect to Section 1983, to apply the common law as modified by the statutes of the forum state, unless that law is "inconsistent" with federal law. 42 U.S.C. § 1988(a). This Court has admonished that Section 1988's borrowing provision is "more than a mere technical obstacle to be circumvented if possible." *Burnett v. Grattan*, 468 U.S. 42, 60 (1984) (internal quotation marks omitted). Section 1988 embodies a congressional determination that state law, not federal common law, provides the most suitable source of law for rounding out Section 1983's remedial scheme.

As this Court recognized in *Robertson v. Wegmann*, 436 U.S. at 589, federal law is not adapted to the object of recovery for injuries to a decedent under Section 1983. Section 1983—in accordance with the common law rule

at the time it was enacted—does not by its terms contain a survival or wrongful death provision. That omission is telling, for Congress appreciated the fact that there was no recovery for wrongful death at common law, and knew how to provide for a departure from that rule when it wanted to do so, as it did in Section 1986 of the Civil Rights Acts, enacted at the same time as Section 1983.

Because federal law is not adapted to the object of survival or wrongful death, Section 1988 instructs that the Alabama Wrongful Death Act—which abrogates the common law rule barring recovery for death—must be applied in Section 1983 actions brought in that state, unless it is inconsistent with federal law. There certainly is no express inconsistency between the Alabama statute and federal law; as noted, federal law does not address the right of a decedent's estate to bring a survival or wrongful death action under Section 1983, although it does establish a wrongful death remedy for *other* violations of the Civil Rights Acts. That the Alabama statute does not supply a wrongful death remedy in the particular circumstances of this case cannot possibly be deemed inconsistent with federal law, when the 42d Congress plainly knew how to create such a remedy but chose not to do so in the case of Section 1983.

Nor is there any reason to imply an inconsistency based on the general policies of Section 1983, which include compensating those injured by a deprivation of federal rights and deterring such violations in the future. As Justice Marshall wrote for the Court in *Robertson v. Wegmann*, 436 U.S. at 592 (emphasis added), “[t]he goal of compensating *those injured* by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased’s estate.” This case presents no occasion for the Court to consider whether Section 1983 requires compensation of survivors for their own injuries, because the administrator here seeks damages only for injuries to the decedent. As for deterrence, that is the emphatic purpose of the Alabama Wrong-

ful Death Act. Moreover, as this Court observed in *Robertson*, it is “far-fetched” to suggest that a state actor, even one that has taken upon itself to learn the intricacies of a state wrongful death or survival scheme, “would * * * be influenced in its behavior by its provisions.” *Id.* at 592, 593 n.10.

At bottom, petitioners’ position is that the Alabama Wrongful Death Act must be inconsistent with federal law because, given the interplay between *Fact Concerts* and the Alabama damages scheme, a decedent’s estate is denied recovery under Section 1983 against municipal defendants. This Court squarely rejected such a result-oriented approach to the Section 1988 “consistency” analysis in *Robertson*, stating that “[a] state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” 436 U.S. at 593. Moreover, petitioners here—unlike the plaintiff in *Robertson*—are not denied any avenue of redress under federal law. They may bring substantial Section 1983 damages claims for wrongful death under the Alabama statute against the individuals involved in the alleged wrongdoing, but have of their own volition elected not to press such claims.

Because application of the Alabama statute to Section 1983 claims is not inconsistent with federal law, Section 1988 directs that the statute governs the recovery by a decedent’s estate under Section 1983. This case accordingly presents no occasion for the Court to undertake to fashion a federal common law survival or wrongful death regime for Section 1983, and petitioners’ objection to the recovery available under Section 1983 should be directed to Congress, not this Court. Congress has acted to expand the recovery available in wrongful death actions brought in Alabama under the Federal Tort Claims Act, where a similar problem arose due to the intersection between applicable federal and state damages rules. There is no reason to presume that Congress will not act in a similar

fashion if it determines that the wrongful death remedy available to Alabama plaintiffs is inadequate under Section 1983.

ARGUMENT

The question framed by this Court arises because Congress has not addressed the availability of survival or wrongful death claims under Section 1983. Congress has, however, supplied the methodology for resolving this question in 42 U.S.C. § 1988(a). *First*, courts are to look to "the laws of the United States, so far as such laws are suitable to carry [the Civil Rights Acts] into effect." *Id.* *Second*, if those laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," courts are to look to "the common law, as modified and changed by the constitution and statutes" of the forum state. *Id.* *Third*, courts are to apply this state law "so far as [it] is not inconsistent with the Constitution and laws of the United States." *Id.* *Accord* *Burnett v. Grattan*, 468 U.S. at 60.

Both this Court and the lower courts have invoked Section 1988 to determine the remedies available to decedents or their survivors under Section 1983. *See, e.g., Robertson v. Wegmann*, 436 U.S. at 588-589; *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973) (citing *Brazier v. Cherry*, 293 F.2d 401, 407-409 (5th Cir.) (involving both wrongful death and survival claims), *cert. denied*, 368 U.S. 921 (1961)); *Jones v. Hildebrandt*, 550 P.2d 339, 343-344 nn.4 & 5 (Colo. 1976) (citing additional cases), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977). The Alabama Supreme Court below invoked Section 1988, J.A. 119, and the parties agree that Section 1988 governs this case. *See* Pet. Br. 4-5, 7. As explained below, Section 1988 directs that the Alabama Wrongful Death Act be applied to govern the recovery by a decedent's estate under Section 1983.¹²

¹² Section 1988 is by its terms addressed to "proceeding[s]" and "remedies" available in actions brought in federal "district courts."

I. FEDERAL LAW IS NOT ADAPTED TO THE OBJECT OF RECOVERY BY A DECEDENT'S ESTATE UNDER SECTION 1983 FOR INJURIES TO A DECEDENT.

1. Before determining whether federal law is adapted to the particular object in question, it is necessary to understand the nature of the Section 1983 claims asserted. The Section 1983 counts pleaded by the decedent's estate in this case seek damages for injuries to a decedent, not to any survivors. *See* note 8, *supra*. As a result, they are in common parlance better regarded as survival rather than wrongful death claims. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. at 575 n.2, 578 n.5 (survival laws permit "the deceased's estate to prosecute any claims for

42 U.S.C. § 1988(a). For at least two reasons, however, the Alabama Supreme Court properly looked to Section 1988 in this state court proceeding. First, Section 1988's focus on federal court proceedings is most likely explained by the fact that, when Section 1988 was first enacted in 1866, it was part of a provision (§ 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27) establishing *exclusive* federal jurisdiction over enforcement of the Civil Rights Acts. *See Moor*, 411 U.S. at 704-705 & n.18. By the time Congress enacted Section 1983 (in 1871), § 3 of the 1866 Act had been amended to make federal jurisdiction over proceedings brought under the Civil Rights Acts concurrent with that of the states; the pertinent text of what is now Section 1988, however, simply was never changed to reflect that civil rights actions may be brought in state court, too. Second, construing Section 1988 to apply only to federal court proceedings could subject Section 1983 actions to different rules depending on whether the action is brought in federal or state court, contravening the settled principle that "the outcome of * * * litigation in * * * federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). In any event, if Section 1988 does not apply to state court proceedings, the preemption analysis set forth in *Felder v. Casey*, 487 U.S. 131 (1988) would apply, and, for the reasons explained in Part II, *infra*, the *Felder* preemption analysis—which focuses on whether the state rule "is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law," *id.* at 153, and thus tracks the Section 1988 analysis—should produce the same result as Section 1988.

personal injury the *deceased* would have had, but for his death," whereas wrongful death laws create a cause of action in favor of the decedent's survivors for their own injuries resulting from the decedent's death, such as for loss of consortium) (emphasis in original); Charles T. McCormick, *Law of Damages* § 93 at 335-337 (1935) (same); note 1, *supra*. The Alabama Supreme Court below accordingly certified and decided only the "question of the *survivability* of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983." J.A. 118 (emphasis added). *Accord id.* 109.¹³

This Court has previously held that federal law does not address the survival of Section 1983 claims, *see Robertson v. Wegmann*, 436 U.S. at 589 ("one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant'") (quoting *Moor*, 411 U.S. at 702 n.14), and petitioners candidly concede the point. *See* Pet. Br. 7 ("The issue in this case arises out of the lack of a survival provision in § 1983."); *accord* Pet. i, 5. Thus, there is no question here that federal law is "not adapted to the object," or is "deficient," 42 U.S.C. § 1988(a), with respect to the damages available to a decedent's estate under Section 1983 for injuries to a decedent, and that the inquiry accordingly must proceed to the second step of the Section 1988 analysis.

2. In any event, to the extent the Section 1983 counts in this case may also, or alternatively, be regarded as presenting wrongful death claims, federal law plainly does not address the viability of such claims under Section 1983

¹³ In this regard, the popular name of the Alabama statute at issue in this case—the Alabama Wrongful Death Act—is something of a misnomer. Indeed, petitioners themselves have characterized that statute as a "survivorship provision." Pet. i. ("In a case brought in Alabama, the survivorship provision that becomes operative pursuant to § 1988 is the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975).").

either.¹⁴ This Court has already rejected the notion that the Constitution supplies any right to bring a wrongful death action, *see Parham v. Hughes*, 441 U.S. 347, 358 n.12 (1979) ("It cannot seriously be argued" that there is a constitutional right "to sue for the wrongful death of another."), and petitioners here do not suggest otherwise. Nor can Section 1983, or any other provision of federal law applicable to Section 1983, be construed to create such a cause of action.

a. Section 1983 provides that anyone acting under color of state law who deprives another of a federal right¹⁵ shall be liable "to the party injured." 42 U.S.C. § 1983. This language confers a remedy on the person injured due to the deprivation of *her* federal rights; it does not, however, confer a remedy on a third party based upon the deprivation of *someone else's* rights, which, as noted, is the essence of a wrongful death action. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("By the plain terms of § 1983 * * * to state a cause of action under that statute * * * the plaintiff must allege that some person has deprived *him* of a federal right") (emphasis added); *Hall v. Wooten*, 506 F.2d 564, 566 (6th Cir. 1974) ("[O]ne may not sue [under Section 1983] for the depriva-

¹⁴ Although Section 1983 wrongful death cases have reached this Court, *see City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), in none of those cases did the Court address the question presented here. In *Jones v. Hildebrand*, 432 U.S. 183, 185 (1977), the Court granted certiorari to consider "whether a State's limitation on damages in a wrongful death statute would control in an action brought pursuant to § 1983," but dismissed the writ as improvidently granted.

¹⁵ It is well established that Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). *Accord Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality); *Graham v. Connor*, 490 U.S. 386, 393-394 (1989); *Tuttle*, 471 U.S. at 816.

tion of another's civil rights"). See also William H. Theis, *Shaw v. Garrison: Some Observations On 42 U.S.C. § 1988 And Federal Common Law*, 36 La. L. Rev. 681, 690 (1976).¹⁶

b. That Section 1983 supplies no wrongful death remedy is underscored by 42 U.S.C. § 1986. Originally enacted along with Section 1983 as part of the Civil Rights Act of 1871, see Act of Apr. 20, 1871, ch. 22, § 6, 17 Stat. 13; *Monroe v. Pape*, 365 U.S. 167, 189-190 (1961); *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 666 (1978), Section 1986 creates a remedy against persons who are aware of, and have the power to prevent, conspiracies prohibited by 42 U.S.C. § 1985, but neglect or refuse to do so. Unlike any other provision of the Civil Rights Acts (including Section 1983), Section 1986 explicitly establishes a wrongful death remedy, providing:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; * * * *and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the de-*

¹⁶ Petitioners have alleged no violation of their own constitutional rights, only the decedent's. See J.A. 8-10. Nor have they alleged an unconstitutional interference with their familial relationship with the decedent. Cf. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 563 (1st Cir.) ("a parent cannot maintain a claim for loss of familial association under 42 U.S.C. § 1983 unless the government action in question is directly aimed at the relationship between a parent and young child") (Breyer, J.), cert. denied, 488 U.S. 823 (1988).

ceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. [42 U.S.C. § 1986 (emphasis added).]

The absence of any comparable provision governing the contemporaneously enacted Section 1983 is compelling evidence that the 42d Congress did not intend to create a wrongful death remedy for Section 1983. See *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (internal quotation marks omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); cf. *Burnett v. Grattan*, 468 U.S. at 48 (concluding that courts must look beyond Section 1983 for the limitations period applicable to that statute and observing that "[o]nly 42 U.S.C. § 1986 contains a statute of limitations"). Indeed, Section 1986 confirms that Congress knew how to create a wrongful death or survival provision when it wanted to, but simply declined to do so for Section 1983.¹⁷

¹⁷ When Congress enacted wrongful death statutes in the early and mid twentieth century, it also did so in express language. See National Parks Act, 16 U.S.C. § 457; Federal Tort Claims Act, 28 U.S.C. § 2674; Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51; Jones Act, 46 U.S.C. App. § 688(a); Death On The High Seas Act, 46 U.S.C. App. § 761. For example, FELA—which was first enacted in 1908, see Act of Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65—provides that railroad common carriers "shall be liable in damages to any person suffering injury while he is employed by such carrier in [interstate] commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of" his or her survivors, where the railroad's negligence caused the death or injury. 45 U.S.C. § 51. These statutes provide still further evidence that Congress did not—and has not—created any wrongful death or survival provision for Section 1983.

c. The legislative history of Section 1983 does not compel any different conclusion. The debates over the Civil Rights Act of 1871 do contain references to killings. In what is perhaps the most frequently quoted passage, *see, e.g., Wilson v. Garcia*, 471 U.S. 261, 276 (1985), Representative Lowe stated: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective." Cong. Globe, 42d Cong., 1st Sess. 374 (1871). That the 42d Congress was concerned about "the alarming insecurity of life, liberty, and property in the Southern States," *Wilson v. Garcia*, 471 U.S. at 276, however, does not mean that it intended to make Section 1983 a vehicle for wrongful death or survival claims, in derogation of the common law.

Indeed, none of the comments on which petitioners rely—plucked from volumes of transcripts of extraordinarily emotional floor debates—are tied to references to Section 1983 and, in fact, were most likely addressed toward Section 1985.¹⁸ Any remarks addressed to Section 1985, of course, say little, if anything, about Section 1983. And general remarks such as Representative Lowe's, untethered to any specific section of the Civil Rights Acts, are plainly insufficient to override the conclusion that follows from the *text* of those Acts, and, in particular, Sections 1983 and 1986. *See Shannon v. United States*, 512 U.S. 573, 583-584 (1994) (refusing to give weight to legislative history "in no way anchored in the text of the statute" since "[c]ourts have no authority to enforce [a] principle gleaned solely from legislative history that has no statutory reference point") (internal quotation marks omitted).

¹⁸ It appears that Representative Lowe himself had Section 1985 in mind when he warned that "murder is stalking abroad in disguise." *See* 42 U.S.C. § 1985(3) ("If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another") (emphasis added).

At the same time, the fact that Section 1983 does not supply a wrongful death or survival remedy does not mean that the 42d Congress' concern about murder received no legislative expression, or that there is no redress for such acts. First, even if one who committed murder in violation of the civil rights laws could have escaped federal civil liability, such conduct would plainly subject the perpetrator to possible criminal prosecution. *See Screws v. United States*, 325 U.S. 91 (1945). Second, through Section 1986 of the Civil Rights Acts, Congress *did* provide a wrongful death remedy for certain violations, including violations of Section 1985, to which Representative Lowe's remarks were most likely addressed. *See* note 18, *supra*. And third, Congress ensured through Section 1988 that plaintiffs would be able to take advantage of state wrongful death or survival laws—including Alabama's—permitting certain actions on behalf of the deceased or their survivors.

3. "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." *Fact Concerts*, 453 U.S. at 258. Thus, in construing Section 1983, this Court assumes "that members of the 42d Congress were familiar with common-law principles * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Id. Accord Carey v. Piphus*, 435 U.S. 247, 255 (1978). Accordingly, where a doctrine "was well established at common law by 1871, [this Court] proceed[s] on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Fact Concerts*, 453 U.S. at 263 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). *Accord Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).¹⁹

¹⁹ This Court's historical approach to the construction of Section 1983 coheres with the rule that "[s]tatutes which invade the com-

As this Court recently reiterated, the "common law in the United States, like the common law of England, did not allow recovery for an injury which results in death." *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 624 (1996) (internal quotation marks omitted). See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 379-396 (1970); *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344-346 (1937); *Insurance Co. v. Brame*, 95 U.S. 754, 756-757 (1877). Thus, as Justice Harlan explained, "[a]t common law, no person had a legally cognizable interest in the wrongful death of another person, and no person could inherit the personal right of another to recover for tortious injuries to his body." *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (dissenting). See generally Francis B. Tiffany, *Death By Wrongful Act* (2d ed. 1913); T.A. Smedley, *Wrongful Death—Bases of the Common Law Rule*, 13 Vand. L.J. 605 (1960); W.S. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916).²⁰

mon law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). Accord *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). See *Tome v. United States*, 513 U.S. 150, 163 (1995) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.") (internal quotation marks omitted).

²⁰ The common law rule barring recovery for death consists of two distinct doctrines. See Tiffany, *supra* § 1 at 1-3; Smedley, *supra*, at 605. First, pursuant to the maxim *actio personalis moritur cum persona*—personal actions die with the person—a cause of action to redress an injury abated upon the death of the injured party or the tortfeasor. See, e.g., *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 67 (1913) ("Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured"). Under the second doctrine,

There can be no question that in 1871—the year in which Section 1983 was enacted—the common law provided no civil remedy for a decedent or his survivors for wrongful death. See, e.g., *Georgia R.R. & Banking Co. v. Wynn*, 42 Ga. 331, 334 (1871) (calling *Baker v. Bolton* "the rule of the common law"). Indeed, in 1877—just six years after Section 1983 was adopted—this Court in *Insurance Co. v. Brame* stated:

The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. [95 U.S. at 756-757.]

The right to recover in a civil action for the death of another came about not through evolution of the common law, but through legislative action. In 1846 England created a wrongful death action in Lord Campbell's Act, 9 & 10 Vict., ch. 93. On these shores, following England's lead, "statutes substantially the same in tenor followed in quick succession in one state after another, till today

no one could maintain a civil action to recover for the wrongful death of another. See, e.g., *Van Beeck*, 300 U.S. at 344 ("[A]n action of tort damages are not recoverable by any one for the death of a human being"). These doctrines have been modified by survival and wrongful death statutes, respectively.

The common law rule was given expression in the nineteenth century by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808), who declared that "in a civil court, the death of a human being could not be complained of as an injury." See *Moragne*, 398 U.S. at 383; Tiffany, *supra* § 3 at 5. The rule of *Baker v. Bolton* early on became part of the common law of the United States. See *Moragne*, 398 U.S. at 384 ("American courts generally adopted the English rule as the common law of this country as well"). See, e.g., *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475, 48 Am. Dec. 616, 617 (1848) ("[W]e can not doubt" that the rule of *Baker v. Bolton* "is the doctrine of the common law").

there is not a state of the Union in which a remedy is lacking." *Van Beeck*, 300 U.S. at 346. See also 2 Dan B. Dobbs, *Law of Remedies* § 8.3(1) at 423 (2d ed. 1993) (discussing development of wrongful death and survival statutes); note 10, *supra* (explaining history of Alabama statute).

Thus, viewed in light of the common law background against which it was enacted, it is clear that Section 1983 does not establish either a survival or wrongful death action.²¹ That England and most States had enacted survival and wrongful death statutes by 1871 underscores that conclusion. Congress is presumed to have been aware of these developments, see *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("the well-settled presumption [is] that Congress understands the state of existing law when it legislates"), and therefore must have known that, if the common law rule was to be abrogated, legislation like Section 1986 and similar state law provisions was required. Congress, however, chose not to abrogate the common law rule for actions brought under Section 1983.

This Court in analogous circumstances has refused to imply statutory remedies in derogation of the common law rule prevailing at the time of enactment. In *Panama Railroad v. Rock*, 266 U.S. 209 (1924), for example, a husband seeking to recover damages for the death of his wife—allegedly caused by the negligence of a railroad—invoked an applicable federal statute providing that "[h]e who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it." *Id.*

²¹ In fact, in urging adoption of what is now Section 1986, Representative Shellabarger—the floor manager of the Civil Rights Act of 1871 (which included both what is now Section 1983 and Section 1986)—expressly acknowledged that "at common law, where death ensues from a wrong against a person, there is no right of action." Cong. Globe, 42d Cong., 1st Sess. 805 (1871). That rule was changed in Section 1986 with respect to certain violations of the rights guaranteed by Section 1985, but was not changed with respect to Section 1983.

at 211 (internal quotation marks omitted). This Court, however, refused to construe that generally worded statute as providing a wrongful death action, explaining that "the reach of the statute is to be determined by the application of common law principles," and that "under the principles of the common law, it has required *specific statutes* to fix civil liability for death by wrongful act." *Id.* at 214, 215 (emphasis added). Section 1983, like the statute in *Rock*, lacks specific language modifying the common law rule, and thus does not confer a cause of action for wrongful death. See also *Michigan Cent. R.R.*, 227 U.S. at 67 (Federal Employers Liability Act of 1908 did not depart from common law no-survival rule since it did not "expressly provide" for survival); *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 338 n.7 (1988) (same).

4. This Court's decision in *Moragne v. States Marine Lines, Inc.*, *supra*, is not to the contrary, and provides no license for this Court to fashion a federal common law wrongful death or survival remedy for Section 1983. In *Moragne* this Court rejected the common law rule against recovery for death, and held that a cause of action for wrongful death can be prosecuted under general maritime law. In so holding, however, the Court expressly invoked its broad federal common lawmaking authority in admiralty, observing that "'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" 398 U.S. at 405 n.17 (quoting *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)).²² Precisely the opposite is true here. Indeed,

²² See also *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. at 624 (general maritime law is "a species of judge-made federal common law"); *American Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994) ("there is an established and continuing tradition of federal common lawmaking in admiralty"); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) ("[T]he Judiciary has traditionally

through 42 U.S.C. § 1988 Congress has expressly precluded any such role for the courts, instructing instead that when existing federal law does not cover the area, courts should incorporate state law so long as doing so would not be inconsistent with federal law. *See infra* at 41-42.

This conclusion is firmly supported by the text of Section 1988. In determining under the first step of the Section 1988 analysis whether "the laws of the United States * * * are not adapted to the object, or are deficient" with respect to the question of the remedies available to a decedent's estate under Section 1983, 42 U.S.C. § 1988(a), the Court is not at liberty to craft federal common law to fill any gaps in Section 1983's remedial scheme. Read in context, the phrase "the laws of the United States" plainly refers to constitutional and statutory—but not common—law: the juxtaposition with the subsequent reference to "the common law," to be resorted to in the event "the laws of the United States" are silent or deficient, confirms the latter phrase is distinct from and does not encompass the former.

More fundamentally, reading the phrase "laws of the United States" to include federal common law would render the second and third steps of the Section 1988 inquiry—to which we turn next—a nullity. This Court could always fill a perceived gap in a federal statutory scheme by creation of federal common law. If Congress had contemplated such an exercise *before* finding that "the laws of the United States" were "not adapted to the object, or [were] deficient," there would have been no reason to include the borrowing provision of Section 1988. Yet Congress included such a provision and, through it, instructed courts in plain terms to borrow "the common law, as modified and changed" by the pertinent state law,

taken the lead in formulating flexible and fair remedies in the law maritime").

id., rather than make federal common law, in filling gaps in the Section 1983 scheme. The *Moragne* paradigm accordingly has no place under Section 1988.

II. APPLICATION OF THE ALABAMA WRONGFUL DEATH ACT TO SECTION 1983 CLAIMS BROUGHT IN THAT STATE IS NOT INCONSISTENT WITH FEDERAL LAW.

1. Because federal law does not cover survival or wrongful death actions under Section 1983, the next step under Section 1988 is to consider application of "the common law, as modified and changed by the constitution and statutes" of the forum state. 42 U.S.C. § 1988(a).²³ Alabama, like each of the 49 other states, has abrogated the common law no-recovery-for-death rule, and, indeed, over the past century has enacted a comprehensive statutory survival and wrongful death scheme.

In Alabama a party may bring an action for wrongful death of a minor (Ala. Code § 6-5-391) or an adult (*id.* § 6-5-410), as well as for injuries to property resulting from acts causing death (*id.* § 6-5-411). Section 6-5-410—which Mrs. Jefferson's representative invokes—permits a personal representative to maintain an action for the "wrongful act, omission, or negligence of any person" resulting in his decedent's death. Because the purposes of this action are "to protect human life, to prevent homicide, and to impose civil punishment on takers of

²³ In *Burnett v. Grattan*, 468 U.S. at 48 (quoting Section 1988; emphasis added), this Court said that the inquiry under Section 1988's second step is to look to "state 'common law, as modified and changed by the constitution and statutes.'" That interpretation is plainly correct. But, to the extent Section 1988's reference to "common law" could be construed otherwise, *cf. Robertson*, 436 U.S. at 589-590 n.5 (phrase could be interpreted to refer "to the kind of general common law that was an established part of our federal jurisprudence by the time of § 1988's passage in 1866"), it is immaterial here, since, as was the case in *Robertson*, *see id.*, it is undisputed that Alabama has modified the common law by statute.

life," *Geohagen v. General Motors Corp.*, 279 So.2d at 439, the Alabama courts have for more than a century held that wrongs causing death are remedied through punitive rather than compensatory damages. See note 10, *supra*.

Under the third step of the Section 1988 analysis, Alabama law—and, in particular, Section 6-5-410—governs the recovery by a decedent's estate under Section 1983, unless it is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988(a). "This admonition is more than a mere technical obstacle to be circumvented if possible." *Burnett v. Grattan*, 468 U.S. at 60 (internal quotation marks omitted). Indeed, "[i]n enacting 42 U.S.C. § 1988 Congress determined that gaps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law." *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (emphasis added).²⁴ Courts are bound by this statutory directive in adjudicating Section 1983 actions. In this case Section 1988 compels the conclusion that the Alabama Wrongful Death Act governs the recovery available under Section 1983 by a decedent's estate for injuries to the decedent.

2. Petitioners' principal contention is that the Alabama Wrongful Death Act is inconsistent with Section 1983 because, given the interplay between this Court's decision in *Fact Concerts*—which bars recovery of punitive dam-

²⁴ See also *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980) (Section 1988 "quite clearly instructs [courts] to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983") (internal quotation marks omitted); *Robertson*, 436 U.S. at 593 n.11 ("§ 1988 instructs [courts] to turn to state laws, unless an 'inconsistency' with federal law is found"); *Wilson v. Garcia*, 471 U.S. at 281 ("This Court has consistently interpreted § 1988 as instructing that the rule applicable to the analogous state claim shall furnish the rule of decision 'so far as the same is not inconsistent with the Constitution and the laws of the United States'") (O'Connor, J., dissenting) (quoting Section 1988; citing additional authorities).

ages against a municipal defendant in a Section 1983 action—and the Alabama statute—which redresses wrongful death by the provision of punitive rather than compensatory damages—a decedent's estate may be barred from recovering compensatory and punitive damages from a municipal defendant in a Section 1983 action for injuries to the decedent. See Pet. Br. 5, 10-11. Under this Court's Section 1983 precedents, however, that argument fails.²⁵

a. There certainly is no express inconsistency between federal law and the Alabama Wrongful Death Act. As discussed, Section 1983—in accordance with the common law of the day in which it was enacted—has no survival or wrongful death provision. That omission is telling, because the 42d Congress plainly knew how to abrogate common law rules—which would otherwise be applied to actions brought under the Civil Rights Acts—when it wanted to do so, and expressly did so in Section 1986, in establishing a \$5,000 wrongful death remedy to redress certain violations of Section 1985 of the Civil Rights Acts. See *supra* at 20-21.

That the Alabama Wrongful Death Act may not furnish such a remedy in a particular instance simply cannot be deemed inconsistent with Section 1983, when the 42d Congress could have—but did not—furnish a federal wrongful death remedy in the first place. Any other conclusion presupposes that there must be such a remedy as a matter of federal law—a conclusion that cannot be

²⁵ Petitioners have not alleged that the Alabama statute intentionally discriminates against Section 1983. Nor could they. Alabama adopted its punitive-only damages rule more than a century before this Court held in *Fact Concerts* that punitive damages are unavailable against a municipality in a Section 1983 action. Indeed, for most of the time the Alabama rule has been in effect, municipalities were not liable for any damages under Section 1983. See *Fact Concerts*, 453 U.S. at 258-259.

squared with the common law rule at the time, well known to the members of Congress, and their deliberate action to provide such a remedy when they intended to do so. *See Fact Concerts*, 453 U.S. at 258 ("One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.").

b. Nor is there any inconsistency between the Alabama Wrongful Death Act and the general policies of Section 1983—"compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 436 U.S. at 591. In *Robertson* this Court held that "[t]he goal of compensating *those injured* by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." *Id.* at 592 (emphasis added). At the same time, the Court distinguished the more typical claim in wrongful death actions, where "recovery [is sought] by survivors who are suing under § 1983 for injury to their own interests." *See id.* at 592 n.9. *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. at 385 (recognizing the distinction between actions brought to recover for a decedent's "own personal claims" and those brought "to recover for the injury [a survivor] suffers from the victim's death").

The Section 1983 counts pleaded in this case seek recovery for injuries to a decedent, not to the interests of survivors. *See* J.A. 9, 10-11. Accordingly, as *Robertson* holds, Section 1983's compensation goal would not be undermined by denying recovery, since any damages would go to the estate rather than to the party injured, who is dead and thus quite incapable of being compensated. *See, e.g., Carter v. City of Birmingham*, 444 So.2d

at 376 ("It is clear that where the injured party is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded. No damage award could compensate him.") (internal quotation marks omitted; emphasis in original); *Bowling v. Oldham*, 753 F. Supp. 588, 590 (M.D.N.C. 1990) ("Compensating the injured party is immaterial because [he] is dead."); *Jones v. George*, 533 F. Supp. 1293, 1305 (S.D.W.V. 1982) ("The other stated policy of § 1983, that of compensating the victim of constitutional deprivation, is not in issue as it relates to personal injury claims, since Elmer Combs is dead."); *Prunty v. Schwantes*, 162 N.W.2d 34, 39 (Wis. 1968) ("After a person dies, he can no longer be compensated").²⁶

Even the decision on which petitioners most heavily rely—*Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), *see* Pet. Br. 4, 5, 11, 12, 15, 19—would not afford them the recovery they seek. Although the district court there found the foreclosure of compensatory damages under the Alabama Wrongful Death Act inconsistent with Section 1983, it held that awarding compensatory damages was only required under Section 1983 for losses incurred "by the decedent's survivors," such as loss of consortium and their own pain and suffering. *Id.* at 1309.

²⁶ Petitioners assert that this principle—squarely embraced by this Court in *Robertson*, 436 U.S. at 592—cannot be applied to bar recovery for compensatory damages to a decedent's estate when the act complained of is a deprivation of federal rights resulting in death, rather than injury (however grave or painful). *See* Pet. Br. 13 & n.5. But while Section 1983's interest in deterring constitutional violations may be stronger in the case of death, there is no reason to conclude that the goal of compensation is any more apposite when an estate sues for damages to a decedent killed by a deprivation of federal rights as opposed to a decedent injured by a deprivation of such rights, who later dies of another cause. In neither case is Section 1983's goal of compensation advanced by attempting to "compensate" the decedent's estate.

The court saw "no reason * * * to award compensatory damages for the *decedent's* claims," because, as the court put it, "[o]bviously, the decedent cannot be compensated at this point and such damages are not necessary to compensate his survivors." *Id.* (emphasis added). Because petitioners do not seek recovery under Section 1983 for injury to their own interests as a result of Mrs. Jefferson's death, there is no occasion for this Court to reach the question decided in *Weeks*. See *American Dredging Co. v. Miller*, 510 U.S. at 457 ("it is quite impossible for [the Court's] holding to be any broader" than the facts presented in the case before it).

Because Mrs. Jefferson can no longer be compensated for her injuries, any recovery on her behalf would require awarding damages under Section 1983 "for noncompensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right"—something that Alabama law may permit through operation of its punitive damages regime, but which this Court has held Section 1983 "leaves no room for." *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 309-310 (1986). See *Carey v. Piphus*, 435 U.S. at 260-261 (rejecting notion of awarding damages "to compensate * * * for the injury which is inherent in the nature of the wrong" in absence of proof of actual damages) (internal quotation marks omitted); *Stachura*, 477 U.S. at 308 ("Carey * * * makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.") (footnote omitted).²⁷

²⁷ This is particularly true in the case of the demand for the "pain, humiliation, and suffering [Mrs. Jefferson] endured." J.A. 9, 10-11 (quoting complaint). "[D]amages for pain and suffering are * * * not truly compensatory," inasmuch as "[t]hey are inherently noneconomic and are established through the subjective discretion of the jury." *Monessen Southwestern Ry. v. Morgan*, 486 U.S. at 348 n.5 (Blackmun, J., joined by Marshall, J., concurring in part and dissenting in part) (citing Dan B. Dobbs, *Law of Remedies* § 8.1 at 548-550 (1973)).

Moreover, this Court itself has recognized that compensatory damages will not always be available for violations of Section 1983. See, e.g., *Carlson v. Green*, 446 U.S. at 22 n.9 ("punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"). Indeed, even after barring recovery of punitive damages in Section 1983 actions against municipalities in *Fact Concerts*, this Court has reiterated that there will be situations in which Section 1983 plaintiffs will not be able to obtain any compensatory damages, see, e.g., *Smith v. Wade*, 461 U.S. at 55, and thus will be barred from recovering against municipal defendants anything other than nominal damages. See *Carey v. Piphus*, 435 U.S. at 266-267 & n.24 ("deprivation of [constitutional] rights [is] actionable [under Section 1983] for nominal damages without proof of actual injury"). The Court has never suggested, however, that this result is intolerable in light of the general compensation aim of Section 1983.

c. Nor does the Alabama Wrongful Death Act conflict with Section 1983's general policy of deterrence. Indeed, as this Court itself has recognized, the emphatic purpose of the Alabama wrongful death statute is deterrence. See *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) ("the aim of the [Alabama wrongful death] statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it"). See also *Bell v. Riley Bus Lines*, 57 So.2d 612, 615 (Ala. 1952) (the Alabama wrongful death act is intended to "effect[] the declared public policy of preventing homicides"); *Gamble*, *supra* § 37-9 at 549 ("The purpose of the wrongful death statutes has been stated in a variety of fashions, but the general theme running through these statements is that the court has determined that the intent of the legislature was to punish the wrongdoer and provide a deterrent

aimed at dissuading others from acting in a similar manner"); cases cited *supra* at 10-11. Nor has Alabama shied away from subjecting municipalities to liability for wrongful death. See, e.g., *Benson v. City of Birmingham*, 659 So.2d 82 (Ala. 1995) (municipality held liable for \$100,000 plus interest in connection with wrongful shooting of minor).

In order to find that the Alabama Wrongful Death Act has even a marginal influence on the behavior of municipalities in Alabama, this Court would have to disregard the "reasonable assumption" that government officials are motivated "by concern for the Government's integrity," *Carlson v. Green*, 446 U.S. at 21, and assume instead that Alabama municipalities (1) contemplate illegal activity in violation of Section 1983; (2) are aware of the intricacies of the Alabama wrongful death and Section 1983 remedial schemes; (3) would intentionally kill an individual or permit her to die, rather than violate her federal rights to a lesser extent, in order to avoid liability under Section 1983; and (4) would do so fully aware that they may still be subjected to liability for punitive damages in a state law action for wrongful death. This Court has never been willing to make such "far-fetched assumptions," *Robertson*, 436 U.S. at 593 n.10, even when, as here, the challenged remedial rule had the effect of substantially reducing, e.g., *Fact Concerts*, 453 U.S. at 268-270, or barring altogether, e.g., *Robertson*, 436 U.S. at 592, the recovery available against a state actor under Section 1983.²⁸

²⁸ Alabama has abolished the doctrine of municipal immunity, exposing Alabama cities to civil liability for wrongful acts. See *Jackson v. City of Florence*, 320 So.2d 68 (Ala. 1975); Ala. Code § 11-47-190. Indeed, Alabama municipalities are more vulnerable to such liability than their kindred in numerous other states. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 683 n.27 (1980) (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting). By statute, Alabama, like many states, has capped the damages available against a municipality—in any action—at

Because municipalities are not capable of acting without human involvement, this Court would have to make an additional assumption to find the Alabama statute inconsistent with Section 1983's deterrence aim. It would have to assume that the behavior of the individual officers or employees involved in any alleged wrongdoing would be uninfluenced by the fact that *they* may be held liable under Alabama law *and* Section 1983 for their own actions, in addition to being subjected to public "shame and humiliation," possible "corrective action" such as discharge, and state and federal criminal liability. *Fact Concerts*, 453 U.S. at 269. The Alabama Supreme Court specifically recognized this prospect in *Carter*. See 444 So.2d at 380 ("[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him") (quoting *Robertson*, 436 U.S. at 592; emphasis in *Carter*). And, as this Court observed in *Fact Concerts*, "a damages remedy recoverable against individuals is *more* effective as a deterrent than the threat of damages against a government employer." 453 U.S. at 270 (emphasis added).

d. At bottom, petitioners' position is that the Alabama Wrongful Death Act is inconsistent with federal law because it does not permit recovery on the particular Section 1983 claims they have pressed. This Court, however, has squarely rejected such a result-oriented approach to the Section 1988 analysis, emphasizing that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson*, 436 U.S. at 593. Section 1988 compels that conclusion. As Justice Marshall explained for the Court in *Robertson*, "[i]f success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source

\$100,000. Ala. Code. § 11-93-2, discussed at note 11, *supra*. It is implausible to suggest, however, that a municipality, in Alabama or elsewhere, would wantonly subject itself to judgments of that magnitude, even accepting the far-fetched assumptions stated above.

would essentially be irrelevant. But § 1988 quite clearly instructs [courts] to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby." *Id.* *Accord Board of Regents v. Tomanio*, 446 U.S. at 488.

This reasoning is especially compelling when, as here, the plaintiff has failed fully to avail himself of the avenues of redress under Section 1983. Quite unlike the statutory scheme challenged in *Robertson*, the Alabama scheme does not deny plaintiffs any avenue of redress under Section 1983. Indeed, while petitioners have neglected to pursue them, Alabama plaintiffs may seek punitive damages under Section 1983 and the Alabama Wrongful Death Act against the individual officers or employees involved in the alleged wrongdoing. *See Smith v. Wade*, 461 U.S. at 36 n.5, 56 (punitive damages are available against individual Section 1983 defendants for conduct "motivated by evil motive or intent," or "involv[ing] reckless or callous indifference" to federal rights); J.A. 8-10 (pleading Section 1983 claims against "[f]ictitious parties * * * [who] are agents and/or employees of the City of Tarrant, and/or the City of Tarrant Fire Department" in their "individual and official capacities" for "intentional" and "wanton" misconduct).²⁹ As this Court has recog-

²⁹ Under Alabama law individual government officers and employees are required to be indemnified for "damages arising out of the performance of their official duties" for negligent but not "intentional or willful or wanton" conduct. Ala. Code § 11-47-24(a). The City of Tarrant—like all or virtually all other Alabama municipalities—does not follow any practice of indemnifying its employees for intentional, willful, or wanton misconduct. Petitioners here sued as fictitious parties the individuals involved in the alleged wrongdoing, in both their individual and official capacities, and have alleged that they engaged in "intentional" and "wanton" misconduct. J.A. 4-5, 8-10. Thus, if petitioners had undertaken to prove the allegations, they would have been entitled to an award of (uncapped) punitive damages under Section 1983 and the Alabama wrongful death act. *See* note 11, *supra*. Petitioners, however, never attempted to substitute the actual individuals for the fictitious parties named in the complaint, and thus forewent such damages claims.

nized, for a variety of reasons—including the history of Section 1983—individual wrongdoers are more natural targets of Section 1983 claims than municipalities. *See Fact Concerts*, 453 U.S. at 265, 267, 270.³⁰

Finally, the incantation of Section 1983's broad purposes is not, in itself, sufficient to displace the state law rules that Congress has directed courts to apply under Section 1988. As this Court has observed, general statutory purposes may not be invoked to "add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). *See also Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original). Courts therefore are not at liberty simply to supplement federal statutes as they see fit, whenever they believe the statutory purposes will be marginally advanced thereby. As *Robertson* underscores, this fundamental principle of statutory construction is fully applicable in the case of Section 1983. Accordingly, the general policies of Section 1983 do not provide *carte blanche* to retool the statute's remedial scheme as courts may see fit.

4. Because the Alabama Wrongful Death Act is not inconsistent with Section 1983, Section 1988 dictates that

³⁰ Of course, petitioners also may pursue their punitive damages claims under the Alabama Wrongful Death Act against the municipal defendant in this case under state law in prosecuting Count I of their complaint, which is pending on remand.

the statute governs the recovery by a decedent's estate in an action brought in Alabama pursuant to Section 1983. Petitioners are quite wrong in suggesting that this result is unacceptable on the ground that incorporating state law would alter their Section 1983 rights. As this Court has recognized, the natural consequence of Section 1988 is that "state law will *often* provide the content of the federal remedial rule," and that "there will *not* be nationwide uniformity on these issues." *Robertson*, 436 U.S. at 594 n.11 (emphases added). *Accord Tomanio*, 446 U.S. at 489. *See also Chardon v. Soto*, 462 U.S. 650, 663 (1983) ("§ 1988 embodies a congressional determination that the laws of the several States provide the most suitable procedural and remedial rules for application in actions brought under the federal civil rights laws") (Rehnquist, J., joined by Powell and White, JJ., dissenting).³¹

Carlson v. Green, *supra*, is not to the contrary. The Court in *Carlson* emphasized the need for a uniform federal survivorship rule for *Bivens* actions, rejecting the incorporation of state survivorship rules even when state laws were not inconsistent with federal law. 446 U.S. at 23. In Section 1983 actions, however, Congress has expressly specified through Section 1988 that state laws apply when they are not inconsistent with federal law. As the *Carlson* Court noted in distinguishing *Robertson*, "Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy. * * * While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar claim to be bound

³¹ The *Robertson* Court explained: "whatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U.S. at 594 n.11.

only by the law of the State in which they happen to work." 446 U.S. at 24-25 n.11. *Carlson* accordingly is no help to petitioners.

III. THIS COURT SHOULD NOT UNDERTAKE TO FASHION A FEDERAL COMMON LAW SURVIVAL OR WRONGFUL DEATH REGIME FOR SECTION 1983.

1. In place of the Alabama Wrongful Death Act, petitioners urge the creation of a federal common law rule governing Section 1983 actions, entitling a decedent's estate to recover compensatory damages for injuries to the decedent. Because Section 1988 compels incorporation of the Alabama statute, however, petitioners' call for action should be addressed to Congress, not this Court.

a. This Court's federal common lawmaking authority is quite limited. "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). *Accord Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997). Thus, "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally not made by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981).

The determination "whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton*, 117 S. Ct. at 670 (internal quotation marks omitted). Section 1988 leaves no room for federal common lawmaking. Thus, in *Runyon v. McCrary*, 427 U.S. 160, 184 (1976),

this Court expressly rejected the argument that Section 1988 "commission[s] * * * courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the substantive provisions of Sec. 1981 and other civil rights statutes." And, in *Robertson*, the Court stressed that "rules in areas where the courts are free to develop federal common law," such as in admiralty, "have no bearing [under Section 1988]." *Robertson*, 436 U.S. at 593 n.11. Accordingly, any dissatisfaction with the remedies available to Section 1983 plaintiffs in Alabama for wrongful death should be addressed to Congress, not this Court.

This Court reached the same conclusion in *Chardon v. Soto*, *supra*, in holding that Section 1988 compels incorporation of state statutes governing the tolling of statutes of limitation in class actions asserting Section 1983 claims. Following this Court's Section 1988 analysis in *Robertson*, the Court in *Chardon* concluded that "Congress [through § 1988] has decided that § 1983 class actions brought in different States, like individual actions under § 1983, will be governed by differing statutes of limitations and differing rules regarding tolling and tolling effect unless those state rules are inconsistent with federal law." 462 U.S. at 662. Thus, "[u]ntil Congress enacts a federal statute of limitations to govern § 1983 litigation," courts must continue to borrow the applicable state laws. *Id.* So too here, until Congress enacts a federal statute governing the recovery available in wrongful death or survival actions brought under Section 1983, courts must continue to borrow state law.

b. There is no reason to suppose that Congress will not act if it considers such action appropriate. In fact, Congress has acted to address the limitation on recovery resulting from the interplay between applicable federal and Alabama damages rules in wrongful death actions brought in contexts other than Section 1983.

For example, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), makes the United States liable for the negligence of its employees under applicable state law, but does not displace the government's traditional immunity from punitive damages. In FTCA actions brought for wrongful death in Alabama and Massachusetts—which for most of this century also allowed recovery only for punitive damages under its wrongful death statute—the government took the position that it was "not liable" under the FTCA, "since local law assessed only 'punitive damages.'" *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 131 (1956). Congress responded in 1947 by amending the FTCA to make the United States liable for "actual or compensatory damages," when the law of the state in which the wrong occurred provides "for damages only punitive in nature." 28 U.S.C. § 2674. *See Heath v. United States*, 85 F. Supp. 196 (N.D. Ala. 1949) (applying 1947 amendment in wrongful death action brought under Alabama law).

A slightly different situation has arisen in connection with wrongful death actions brought against the Tennessee Valley Authority ("TVA"). The TVA is a federally owned corporation that—like other federal instrumentalities—is immune from liability for punitive damages. Congress has excluded the TVA from the scope of the FTCA (and its 1947 amendment). 28 U.S.C. § 2680(l). As a result, the TVA in numerous suits has succeeded in avoiding liability under the Alabama Wrongful Death Act on the ground that the statute only provides for punitive damages, with respect to which the TVA, as a federal entity, is immune. *See, e.g., Heathcoat v. Potts*, 905 F.2d 367 (11th Cir. 1990); *Springer v. Bryant*, 897 F.2d 1085 (11th Cir. 1990); *Painter v. Tennessee Valley Auth.*, 476 F.2d 943 (5th Cir. 1973) (per curiam). While expressing consternation with this result, the courts have "decline[d] to assume the temerity to so intrude in matters traditionally committed to the States as to declare the existence of a federal right in the survivors to recover

for a decedent's death," and, instead, have held that "[t]he aberration in such cases must find its remedy through [congressional action]," *Painter*, 476 F.2d at 944-945, as it did in the case of the FTCA. Any dissatisfaction with the result dictated by Section 1988 in this case should be met by this Court with the same restraint.

Of course, Congress may decide not to act. Congress did not see fit to create a survival or wrongful death remedy for Section 1983 when it was first enacted—even though, as noted, it did furnish such a remedy for other provisions of the Civil Rights Acts. Out of considerations of federalism, Congress may decline to follow the example of the FTCA; it is one thing for Congress to waive its own sovereign immunity, and another to subject state governments to additional liability under Section 1983. *Cf. Tomanio*, 446 U.S. at 492 (“[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983”). And Congress may conclude that a uniform federal wrongful death or survival regime is not desirable for Section 1983; indeed, this Court itself has observed that “it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work.” *Carlson*, 446 U.S. at 24. In any event, these judgments are more appropriate for Congress than this Court.

2. The alternative is for this Court to undertake the wholesale creation of a federal common law wrongful death and survival regime for Section 1983, displacing not only Alabama's wrongful death statute but the wrongful death and survival laws of the other 49 states, too. Analytically, it is quite impossible for this Court to conclude that the Alabama Wrongful Death Act is inconsistent with federal law without first determining—contrary to the Court's existing precedent—that Section 1983 guarantees a survival or wrongful death remedy to a decedent's estate for injuries to the decedent. That determination effectively will “federalize” a wrongful death or survival remedy for

Section 1983, and thus render Section 1988's borrowing provision inapplicable, not only to the question whether petitioners are entitled to compensatory damages for the “full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured,” J.A. 9, 10-11, but to the plethora of other issues that inevitably will arise in adjudicating wrongful death or survival claims brought under Section 1983 in Alabama, and in other states as well.

The extent to which a refusal to incorporate the Alabama wrongful death regime pursuant to Section 1988 would engage the federal courts in impermissible lawmaking is clear when considering the remedial scheme courts would be required to weave in place of state law. If the Court were to decide—contrary to the state law rule—that compensatory damages must always be recoverable under Section 1983 for injuries to a decedent, the Court would next have to decide how those damages should be measured. Congress and the states have adopted a dizzying array of schemes for calculating compensatory damages in wrongful death and survival actions, which, while overlapping in some respects, conflict in many others.³²

³² Damages may be measured according to injuries to the decedent or to survivors. When, as here, the plaintiff seeks compensation for injuries to the decedent, states take into account varying considerations, including loss of contribution and support, loss of profits in business enterprises, diminished earning prospects, loss of prospective earning power, and estimated duration of contributions. There are majority and minority positions among the states on whether each of these elements is recoverable. States then subject plaintiffs to differing burdens of proof to establish such elements of a damages award. In addition, in some states plaintiffs may recover funeral and burial expenses, medical expenses, and pain and suffering prior to death. An entirely different maze of conflicting damages rules exists for survivors attempting to recover for their own injuries as a result of death, such as loss of consortium or companionship, mental anguish, or pain and suffering of their own. *See generally* 1 Stuart M. Speiser, Charles F. Krause, Juanita M. Madole, *Recovery for Wrongful Death and Injury*

Each of these schemes was adopted based on different policy considerations; it is by no means apparent which should be adopted as the federal common law rule.

This case, moreover, is just the tip of the iceberg. Creating a federal common law rule of damages here would create incongruities with any number of other state wrongful death and survival schemes, which in turn will spur additional litigation of this type. In addition, once the Court has undertaken the task of fashioning a federal common law of wrongful death or survival under Section 1983—which it has wisely eschewed to date—it will inevitably be asked to fashion innumerable other aspects of the wrongful death or survival remedy in cases brought by plaintiffs claiming that state law is inadequate, including, to mention only a few, deciding who is entitled to recover in wrongful death or survival actions (*e.g.*, administrators, parents, siblings, or extended relatives), when such actions may abate, what standard of proof is required to prove damages such as pain, humiliation, or suffering by a decedent, how to calculate the value of a decedent's life, and whether limits may be placed on particular forms of recovery and, if so, at what particular level.

* * * *

In enacting the Civil Rights Acts, Congress did not vest in the courts the responsibility to implement the Section 1983 remedy as they saw fit, but directed instead that courts should incorporate state law as long as it is not "inconsistent" with federal law. Nothing in Alabama's Wrongful Death Act is inconsistent with federal law, including Section 1983 and the general policies underlying it. Accordingly, that state law governs the recovery by the representative of the decedent's estate in this case.

§§ 3:5 to -3:6 (1992) (surveying different state remedial schemes for survival and wrongful death actions).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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